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11 UNITED STATES DISTRICT COURT
12 FOR THE DISTRICT OF NEVADA

13 ANDREW PERRONG, individually and on
14 behalf of all others similarly situated,

15 Plaintiff,

16 v.

17 SPERIAN ENERGY CORP, a Nevada
18 corporation, and ENERGY GROUP
CONSULTANTS, INC., a Kansas
19 corporation.

20 Defendants.
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NO. 2:19-cv-00115-RFB-GWF

**PLAINTIFF'S MOTION TO COMPEL
ENERGY GROUP CONSULTANTS,
INC. TO GATHER RECORDS FROM
THEIR VENDOR TO AVOID THE
DESTRUCTION OF RECORDS THAT
IDENTIFY PUTATIVE CLASS
MEMBERS**

1 Plaintiff has brought this action under the Telephone Consumer Protection Act
2 (“TCPA”), 47 U.S.C. § 227, a federal statute enacted in response to widespread public outrage
3 about the proliferation of intrusive, nuisance telemarketing practices. *See Mims v. Arrow Fin.*
4 *Servs., LLC*, 132 S. Ct. 740, 745 (2012). The Plaintiff seeks to represent a putative class of
5 individuals who are similarly situated for individuals called by Energy Group Consultants, Inc.
6 (“Energy Group”) for the benefit of Sperian Energy Corp. (“Sperian”).
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8 One of the only meaningful ways to identify putative class members in TCPA cases is
9 through calling records. However, not all telecommunications carriers preserve calling records
10 for the length of the Plaintiff’s putative class period. As such, the Plaintiff has repeatedly
11 attempted to confer with Energy Group’s counsel about the need to gather this information from
12 third parties, but it has not been done. At this point, the Plaintiff believes he must secure a Court
13 Order requiring this to be done so Energy Group will ensure it is completed.
14

15 In further support of this motion, the Plaintiff states as follows:

16 1. Congress enacted the TCPA to regulate the explosive growth of the telemarketing
17 industry. In so doing, Congress recognized that “[u]nrestricted telemarketing . . . can be an
18 intrusive invasion of privacy [.]” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-
19 243, § 2(5) (1991) (codified at 47 U.S.C. § 227).

20 2. The TCPA makes it unlawful to make any call (other than a call made for
21 emergency purposes or made with the prior express consent of the called party) using an
22 automatic telephone dialing system or an artificial or prerecorded voice to any telephone number
23 assigned to a cellular telephone service or to a service for which the party is charged per call.
24 *See* 47 U.S.C. § 227(b)(1)(A). The TCPA also prohibits making multiple telemarketing calls in a
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1 12-month period to numbers that are on the National Do Not Call Registry. *See* 47 U.S.C. §
 2 227(c)(5).

3 3. The Plaintiff has alleged that Energy Group sent automated telemarketing calls to
 4 the cellular telephones, telephone numbers where parties are charged for the call, and numbers
 5 on the National Do Not Call Registry for the benefit of Sperian without the recipient's prior
 6 express written consent.

7 4. Because the calls were likely transmitted using technology capable of generating
 8 thousands of similar calls per day, the Plaintiff brought this action on behalf of a proposed
 9 nationwide class of other persons.

10 5. The classes of persons Plaintiff seek to represent includes:

11 Class 1:

12 All persons to whom: (a) Sperian Energy and/or a third party acting
 13 on Sperian Energy's behalf, made one or more non-emergency
 14 telephone calls; (b) using an automatic telephone dialing system; (c)
 15 to their cellular telephone number or to a telephone number that is
 16 charged for the call; and (d) at any time in the period that begins four
 years before the date of filing this Complaint to trial.

17 Class 2:

18 All persons to whom: (a) Sperian Energy and/or a third party acting
 19 on Sperian Energy's behalf, made more than one non-emergency
 20 telephone calls; (b) to a residential telephone number; (c) that had
 been listed on the National Do Not Call Registry for at least 31 days
 prior to the first call; and (d) at any time in the period that begins
 four years before the date of filing this Complaint to trial.

21 *See* ECF No. 12 at ¶ 61.

22 6. The Plaintiff's putative class is based off the fact that the TCPA claims are
 23 governed by the four year federal statute of limitations in 28 U.S.C. §1658(a) ("Except as
 24 otherwise provided by law, a civil action arising under an Act of Congress enacted after
 25 [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues");
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1 *See also Giovaniello v. ALM Media, LLC*, 726 F.3d 106, 115 (2d Cir. 2013) (four-year statute of
2 limitations applies to private TCPA claims in federal court).

3 7. However, not all telecommunications companies, including the companies that
4 are used to engage in automated telemarketing, keep records of telephone activities for up to four
5 years, and without an immediate gathering of records, the likelihood of destruction of this
6 evidence increases with each passing day. Attached as Exhibit 1 is a chart of national
7 telecommunications providers and their respective call detail record retention policies compiled
8 by the Department of Justice.

9
10 8. As detailed in the chart, many of the major telecommunications providers will
11 only retain call record information for 12-18 months, and presumably smaller
12 telecommunications providers keep this information for an even shorter period of time.

13 9. This risk to the putative class members' interests is not merely hypothetical.
14 Multiple decisions have turned on the destruction of telephone records. For example, in *Levitt v.*
15 *Fax.com*, No. 05-949, 2007 WL 3169078, at *2 (D. Md. May 25, 2007), the court denied class
16 certification in a TCPA fax case because "critical information regarding the identity of those who
17 received the facsimile transmissions" was not available. Likewise, in *Pasco v. Protus IP*
18 *Solutions, Inc.*, 826 F. Supp. 2d 825, 831 (D. Md. 2011), the court was compelled to grant the
19 defendant's motion for summary judgment where plaintiffs were unable to obtain the
20 "transmission data on which to support their claims that [the defendant] sent them the unsolicited
21 faxes at issue."

22
23 10. As a result, putative class plaintiffs in TCPA cases are left to either secure an
24 assurance that all of the records have been retrieved and are maintained or file a motion to ensure
25 that this occurs. *See e.g. Fitzhenry v. Career Education Corporation, et. al.*, United States
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1 District Court for the Northern District of Illinois, Civil Action No. 14-cv-10172, Dkt. No.
 2 101 (“The stay on discovery is modified for the limited purpose of requiring Defendant to obtain
 3 and retain records of all outbound calls that were made for purposes of generation of leads for
 4 education services.”); *See e.g. Dickson v. Direct Energy, Inc., et. al.*, United States District Court
 5 for the Northern District of Ohio, Civil Action No. 5:18-cv-00182-GJL (Order Entered May 21,
 6 2018 requiring the Defendant to obtain calling records from their vendor).

7
 8 11. Here, the Plaintiff began to confer with Energy Group about calling records as
 9 soon as counsel for Energy Group appeared on March 25, 2019. *See Exhibit 2.*

10 12. Despite repeated follow ups from counsel for the Plaintiff, and granting Energy
 11 Group an extension of time to respond to the Complaint, Energy Group has not retrieved the
 12 calling records from their vendor, which are at risk of destroying documents that identify
 13 putative class members every day. *Id.*

14 WHEREFORE, the Plaintiff requests that the Court order that Energy Group retrieve all
 15 telecommunications records from their vendor so the parties are not at risk of imminent
 16 destruction of records.
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18 RESPECTFULLY SUBMITTED AND DATED this 19th day of April, 2019.
 19

20 By: /s/ Anthony I. Paronich
 21 Anthony I. Paronich

22 **CERTIFICATE OF SERVICE**

23 I hereby certify that on April 19, 2019, I electronically filed the foregoing with the Clerk
 24 of Court using the CM/ECF system which will automatically send notification to all attorneys of
 25 record.
 26

27 By: /s/ Anthony I. Paronich
 Anthony I. Paronich